No. 83-2156

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

DONALD L. PLOTNICK,
Petitioner,

v.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. IS AN ACCUSED AFFORDED A FAIR TRIAL WHERE THE ACCUSED MAKES ONLY A GENERAL NON-SPECIFIC REQUEST FOR DISCOVERY OF FAVORABLE EVIDENCE AND WHERE UPON POST-TRIAL HEARING, SUCH EVIDENCE IS FOUND NOT TO BE EXCULPATORY AND NOT MATERIAL TO THE ISSUE OF GUILT OR PUNISHMENT?

II. IS THE DUE PROCESS CLAUSE SATISFIED WHERE A TRIAL COURT'S DECISION OVERRULING A MOTION FOR NEW TRIAL IS FAIRLY SUPPORTED BY EVIDENCE OF RECORD?

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OPINIONS BELOW

The opinions of the Franklin County Court of Appeals and the entry of the Supreme Court of Ohio are adequately set forth in the appendix to the petition. The decision of the Franklin County Common Pleas Court, No. 81CR-10-3653(A), overruling petitioner's motion for new trial is unreported and is set out in the appendix, *infra.*, at page A-1

JURISDICTION

Jurisdiction is adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS

Section 1 of the Amendment XIV to the Constitution is adequately set forth in the petition.

STATEMENT OF THE CASE

Respondent believes that petitioner's recitation of the facts of record is inadequate to a determination of the questions presented.

On September 8, 1981, petitioner, Stephen Cubberly and Carl Andrioff attempted to recover a drug debt from Larry King. While doing so, petitioner and his co-defendants poured alcohol on King and set King on fire. Petitioner, Cubberly and Andrioff were charged with aggravated arson and extortion under state penal laws. On April 29, 1982, petitioner was found guilty following a jury trial and his conviction was upheld by state appellate courts.

Petitioner testified at his trial, admitting he was with Cubberly and Andrioff during most of the evening but denying he was present during the time when King was set on fire. Petitioner conceded he had a dinner meeting with his co-defendants and was asked to accompany Cubberly who was attempting to collect a debt owed Cubberly for narcotics. After Cubberly collected monies from one individual, the three stopped at a store where Cubberly purchased two bottles of alcohol. The limousine was then directed to the home of King. (Petitioner asserted that he got out of the limousine before it arrived at King's home.)

King refused to speak with state prosecutors and obtained his own counsel. King was called as a court's witness. Although King denied that petitioner was in the limousine, he recognized Cubberly as one of the three men who demanded money, then doused him with alcohol and set him on fire. He agreed he was screaming while in the limousine. He agreed the three men who came to his home in the limousine were the ones who set him on fire. King was dumped from the car near a supermarket. A nearby resident smothered the flames and called for medical attention.

Gary Wyant was Cubberly's chauffeur throughout the evening that King was burned. Wyant knew each of the men;

petitioner, Cubberly and Andrioff. Wyant drove petitioner, Cubberly and Andrioff from their dinner meeting to the initial drug debt collection point and then to Larry King's home. Petitioner asked King if he (King) had a black suit for a funeral for himself or a member of his family. King entered the limousine. While driving, with petitioner, Cubberly, Andrioff and King in the rear, chauffeur Wyant could hear King screaming loudly that he would obtain the money. Wyant was directed to stop near a supermarket, told to exit and wait, that petitioner and the others would return for him. Petitioner, Cubberly and Andrioff drove off with King in the rear. Nervous, Wyant telephoned his nearby roommate who joined him within five minutes. Shortly, emergency vehicles sped by to the location a block or so away where King was set on fire and thrown out of the limousine.

Within the hour, petitioner, Cubberly and Andrioff returned in another vehicle. Petitioner stated that they had not killed King but he had owed them money. Petitioner then created a false, cover-up story that Wyant and his roommate were to tell police. Petitioner threatened both men with harm if they did not comply. (During his testimony, petitioner admitted he, Cubberly and Andrioff returned and picked up chauffeur Wyant. Petitioner admitted he told both men to tell the false story to police although he denied threatening Wyant and Enderle.)

Wyant appeared at the limousine service offices the next day and announced to manager Kevin Miles that he was quitting. Two police officers were present investigating the crime. Wyant and his roommate both gave statements of what occurred. Petitioner telephoned Miles several times that day, trying to contact chauffeur Wyant. When Miles advised that police had been investigating the crime, petitioner explained what had taken place and stressed that Wyant was to maintain the false story which petitioner devised. The following day petitioner met with Miles and further detailed his involvement in the crime.

Cubberly's former chauffeur Roger Smith testified at trial that in July, 1981, two months before King was burned, Cubberly had sent him to King's house either to collect the money King owed to Cubberly or recover the marijuana. King claimed he did not have the money as he had "fronted" or consigned the marijuana to others. On cross-examination, after describing his duties as chauffeur, driving Cubberly around, Smith was asked if he "... drove Kevin Miles around, also ...." Smith replied that he did not. (Miles was manager of the limousine service from which Cubberly rented a limousine.)

Cubberly's trial was held after that of petitioner. Prior to Cubberly's trial and pursuant to *Kastigar* v. *United States,* 406 U.S. 441 (1972), the state demonstrated that the investigation of Cubberly's narcotics dealings, including the September 8, 1981 burning of Larry King, was complete before Cubberly received a grant of immunity in an unrelated federal prosecution in the State of Washington. *Inter alia,* the state's evidence showed that a month prior to the burning of King, Cubberly's former chauffeur, Roger Smith, had volunteered information to police regarding Cubberly's dealings in narcotics.

Smith's information was included in a progress report of the ongoing police investigation of Cubberly's drug trafficking. The report indicated Smith had been sent to King's house to deliver a message from Cubberly that if King did not pay his debt, people from New York would come to collect. Neither the report nor Smith's trial testimony indicated that Smith actually delivered that message at King's house. The police summary included, *inter alia,* that Smith chauffeured Cubberly around and on one occasion when Miles and Cubberly went out of state to pick up Cubberly's new limousine, Smith drove the two back to Ohio. On the way, Miles and Cubberly stopped at "gay bars".

At petitioner's motion for new trial, Smith explained that he had been sent to King's house on several occasions; that

although he was sent to King's house *to deliver* the message, King was not home at the time. Returning to Cubberly's bakery, he found King present. Cubberly then delivered the threat himself. After King left, Cubberly asked Smith if he knew anyone who could "get physical" with King to collect the debt. When Smith said he did not, Cubberly replied that the threat of persons from New York was merely a scare tactic and that in reality, he had two local people who would "put some muscle on King."

Petitioner filed a motion for new trial claiming that the police summary of Smith's information was exculpatory material under *Brady* v. *Maryland,* 373 U.S. 83 (1963). Applying this Court's decision in *United States* v. *Agurs,* 427 U.S. 97 (1976), the state trial court ruled that petitioner had made only a generalized pretrial discovery request for exculpatory material. The court held that the police report and Smith's information were not exculpatory, not material and did not create a reasonable doubt of petitioner's guilt. The court also held that any discrepancies in the testimony of non-material witnesses would not have created any reasonable doubt of petitioner's guilt.

The intermediate state appellate court affirmed the denial of petitioner's motion for new trial finding any variance in Smith's trial and motion testimony to be minor. Applying the standard of *United States* v. *Agurs, supra.*, the appellate court found the impeachment value of information that Smith drove Miles and Cubberly from Memphis to Ohio and that they entered gay bars "certainly obscure", and that Smith's denial of having driven Miles "around" was not clearly inconsistent when taken in context of his testimony of having been Cubberly's chauffeur. The appellate court rejected petitioner's claim (raised for the first time on appeal) that Smith presented any false evidence. The appellate court also found the trial court's conclusions were supported by evidence in the record.

Further review was denied by the Ohio Supreme Court on April 4, 1984. Rehearing was denied on May 2, 1984.

SUMMARY OF ARGUMENT

The police summary of chauffeur Smith's statements was not exculpatory but inculpatory evidence. The summary did not conflict with Smith's testimony at petitioner's trial or petitioner's motion for new trial. Petitioner's claim, (raised for the first time on appeal), that false testimony was presented at his trial, was rejected by the state courts on a factual finding amply supported by the record.

Petitioner made only a general request for discovery of evidence favorable to petitioner despite the fact that according to petitioner's trial testimony, as early as one hour after the offense, petitioner was aware of his claim that persons from New York were the offenders. Thus, even assuming, *arguendo,* that the police summary were considered to be exculpatory, the evidence did not create a reasonable doubt of guilt which did not otherwise exist. *United States* v. *Agurs,* 427 U.S. 97 (1976).

Petitioner was afforded a fair trial and was found guilty on evidence which proved guilt beyond a reasonable doubt. No exculpatory evidence material to guilt or punishment was withheld from petitioner's trial. No false testimony was presented by any witness for the state. The state court's factual findings are supported by the record.

ARGUMENT

I. THE DECISIONS OF THE STATE COURTS BELOW CORRECTLY APPLIED DECISIONS OF THIS COURT TO THE FACTS OF THE CASE.

Applying the standards of constitutional materiality of evidence announced in *United States* v. *Agurs*, 427 U.S. 97 (1976), the state courts correctly determined that the police summary of investigation was not exculpatory and did not create a reasonable doubt of guilt which otherwise did not exist. This factual finding is supported by the record.

Petitioner's assertion of perjury fails upon examination of the record and was rejected by the state courts below. Witness Smith did *not* testify at petitioner's trial that one month before the crime for which petitioner was convicted, he delivered Cubberly's threat that victim King should pay his debt or face collection by persons from New York. Smith testified that he was sent to collect the money or to recover the drugs. Testimony at trial and upon the motion hearing as well as trial preparation notes of state's counsel made clear that Cubberly sent Smith to collect from or to threaten King on several occasions. The summary of investigation is not inconsistent with Smith's testimony at trial or in the later motion hearing. Consistent with Smith's testimony, the police summary merely recorded that Cubberly sent Smith to King's home "to deliver" the message; not that Smith delivered that message to King.

Petitioner does not reveal to this Court that immediately after Cubberly delivered the threat to King, Cubberly advised Smith that the threat was merely a tactic to frighten King; that Cubberly had two local persons who would act as his collection agents. The report was not exculpatory but inculpatory.

Equally unavailing is petitioner's assertion that during Smith's trial testimony, the prosecution improperly avoided

asking Smith to relate Cubberly's false threat that persons from New York would collect King's drug debt. The exhibits and transcripts before the state trial court on petitioner's motion for new trial demonstrated that the parties litigated the admissibility of a number of co-defendant Cubberly's extrajudicial statements. As the state could not demonstrate the existence of a conspiracy between petitioner and Cubberly at the time Cubberly made the false threat to King, the statement and Cubberly's admission that it was false, was not admissible at petitioner's trial.

Petitioner's assertion that Smith falsely denied acting as chauffeur to limousine service manager Miles is not born out by the record. After being examined by the defense regarding his daily duties as chauffeur for Cubberly, Smith was asked if he "...drove Kevin Miles around, also...." Smith stated he did not. Smith's response was accurate. As chauffeur, Smith daily drove Cubberly "around". He did not drive manager Miles "around". Petitioner asserts that had Smith testified that he once picked up a new limousine with Cubberly and Miles and that during the return trip, Miles and Cubberly stopped in so-called "gay bars", Miles' credibility would have been impeached. Petitioner omits to advise this Court that in fact, Miles did testify at trial that he and Cubberly picked up the limousine out of state and rode back to Columbus together. The police summary does not show that Cubberly and Miles engaged in homosexual acts merely because both entered establishments catering to homosexual clientelle.

Purely impeaching evidence, not concerning a substantive issue, will not be the basis for a new trial unless the defendant can demonstrate that the impeaching evidence probably would result in acquittal. *United States* v. *Anderson,* 574 F. 2d 1347, 1354 (5th Cir., 1978). "...[I]mpeachment evidence can rarely meet this test." *Hughes* v. *Hopper,* 629 F. 2d 1036 at 1038-1039 (5th Cir., 1980), certiorari denied, 450 U.S. 933. See also, *United States* v. *Irvin,* 661 F. 2d 1063 (5th

Cir., 1981); *United States* v. *Magouirk,* 680 F. 2d 108 (11th Cir., 1982). Even assuming, *arguendo,* that Roger Smith made a "false" statement regarding driving Miles "around", false testimony going to credibility of a witness is "material" within the meaning of the rule *only* when the testimony of the given witness may well be determinative of guilt. *United States* v. *Magouirk, supra.,* at 110. See *Giglio* v. *United States,* 405 U.S. 150 (1972).

Moreover, even were the sexual orientation of Miles and Cubberly of more than dubious relevance at trial, it was the subject of lengthy examination by petitioner's counsel and Miles was forced to read his love letter to Cubberly aloud in front of the jury. As Miles readily admitted accompanying Cubberly to Columbus in the new limousine, Smith's statement, even taken out of context as petitioner does, is of no significance at all.

Petitioner's reliance upon *Giglio* v. *United States, supra.,* is misplaced. In *Giglio,* the prosecution's case rested "...almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury." *Ibid.,* 405 U.S. at 154. In contrast, the state's case against appellant rested primarily on the testimony of chauffeur Gary Wyant and his roommate, Paul Enderle. While Miles' testimony had significance in alleging that King would not name petitioner as one of the men who torched him, it was Wyant who placed petitioner with Cubberly and Andrioff throughout the evening from the dinner meeting to the supermarket a block or so and minutes from the torching of King. Enderle corroborated Wyant regarding the cover-up story proposed by petitioner an hour later. Petitioner acknowledged telling Wyant and Enderle to tell a false cover-up story to police. Clearly, the case did not rest "almost entirely" on Kevin Miles.

The within case is controlled by the principles set out in *United States* v. *Agurs,* 427 U.S. 97 (1976). Under *Agurs,* even assuming, *arguendo,* that the progress of investigation

of Cubberly were considered to fall within the rule of *Brady* v. *Maryland,* 373 U.S. 83 (1963), (a position which respondent strenuously disputes), where there is but a general request for "exculpatory material" or "*Brady* material", a new trial is warranted only where the evidence actually creates a reasonable doubt that did not otherwise exist. If the evidence does not create a reasonable doubt, taken in context with the entire record, then a new trial is not appropriate. The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense. *Agurs, supra.,* 427 U.S. at 109, 112, note 20.

One who seeks to make a successful *Brady* claim must establish three factors: (1) the prosecution's suppression of evidence; (2) the favorable character of the suppressed evidence for the defense; (3) the materiality of the suppressed evidence. Applied to the facts of the within appeal, it is clear that petitioner was not entitled to a new trial. First, there was no perjury presented at trial. Second, the evidence of the false threat from Cubberly to King was not exculpatory, but inculpatory, supporting the state's argument that Cubberly did use petitioner Plotnick and co-defendant Andrioff to act as his "local muscle" in collecting drug debts from King. At trial, petitioner admitted knowing of the drug indebtedness, being with Cubberly from a dinner meeting through the first drug debt collection, to the carryout where the alcohol was purchased by Cubberly and after King was set afire. Petitioner agreed that he, Cubberly and Andrioff picked up chauffeur Gary Wyant and his roommate, Paul Enderle after King was burned. Petitioner admitted telling Wyant and Enderle that they should tell a false story to police. Petitioner admitted devising the false story.

Moreover, from his own testimony, petitioner knew of Cubberly's drug dealing with people from New York and the fact of Cubberly's dealing with people from New York was

brought out in the state's case in chief. If there were any truth to his testimony, petitioner certainly knew exactly what his defense would be from the moment he claims he was told by Cubberly that persons from New York burned King. The fact that co-defendant Cubberly obtained his drugs from New York was no secret. Discovery provided to the defense included a transcript of co-defendant Cubberly's statement to Miles that he, Cubberly, was "...involved in multi-million dollar stuff... (and that) there's six guys in there from New York and they're kinda watching everything." The list of potential state's witnesses included the names of Marvin Levi of New York City and Dan Reedy of the New York State Police. Petitioner testified at trial that he knew of Cubberly's drug dealings with people from New York and knew prior to his accompanying Cubberly on the drug debt collections on the evening King was burned that Cubberly was to meet with people from New York.

Thus, had there been any truth to his assertion, petitioner could have made a specific request for exculpatory evidence supporting his theory. Rather, petitioner made only a general request for favorable evidence. This type of request is no better than no request at all. *Agurs, supra.,* at 106-107. A new trial will be awarded only if the evidence not disclosed was first, exculpatory; second, material to guilt or punishment; and third, if presented to the jury, would have created a reasonable doubt of guilt. *Agurs, supra.* The "evidence" in question meets none of these tests.

The state courts correctly applied the relevant decisions of this Court to the facts of this case. Petitioner was afforded a fair trial and was convicted on evidence which proved guilt beyond a reasonable doubt.

II. THE DECISION OF THE STATE TRIAL COURT IS BASED UPON FACTS OF RECORD AND SHOULD BE DEFERRED TO IN THE ABSENCE OF CONVINCING EVIDENCE TO THE CONTRARY.

Petitioner has misstated the findings of the state trial court. Petitioner's quotation from that decision ("...no fact in the report even vaguely related to any fact in the case before the Court, nor involves credibility of material witnesses", Petition, p. 11-12), relates to the findings of the trial court with respect to an event occurring some two to three months prior to the events upon which petitioner was charged. That earlier event, delivery of drugs to co-defendant Cubberly, is not addressed in the petition and no claim of error is based thereon.

The state trial judge did not state that Cubberly's threat to King was a detailed description of petitioner and co-defendant Andrioff as local debt enforcers. Witness Smith had related Cubberly's request for "someone big...that could get physical with him if they had to." The state trial judge was aware that both petitioner and Andrioff fit the general description of being "someone big". Petitioner admitted at his trial that earlier that evening, he and Andrioff went with Cubberly as protection knowing that the trip was to collect a drug debt owed to Cubberly. The trial judge did examine claimed "...discrepancies in the testimony of non-material witnesses as cited by defendant...." but found any such discrepancies did not create any reasonable doubt of guilt. (Decision of trial court, March 29, 1983, Appendix, *infra.*, p. A-2) The state appellate court reached the same conclusion. (Appendix to petition, p. A-8.)

Those findings of historical fact are supported by the record and should be deferred to in the absence of convincing evidence to the contrary. See *Marshall* v. *Lonberger*, ____ U.S. ____, 103 S. Ct. 843, 850 (1983); *Sumner* v. *Mata*, 449 U.S. 539 (1981); *Rushen* v. *Spain*, ____ U.S. ____, 104 S. Ct. 453, 456 (1983) (*per curiam*).

CONCLUSION

Petitioner was fairly tried and convicted upon proof of his guilt beyond a reasonable doubt. No exculpatory evidence was withheld from petitioner and no perjury committed by any witness for respondent. The facts of record do not support petitioner's claims. The state trial court's order denying petitioner's motion for new trial is amply supported by facts of record.

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should not issue in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 28.5(b) of the Rules of the Supreme Court, the undersigned, a member of the bar of this Court, certifies that the requisite number of copies (3) of the foregoing Brief of Respondent have been served upon petitioner, Donald L. Plotnick, by mailing such copies to the office of petitioner's counsel of record, Gary M. Schweickart, 1243 South High Street, Columbus, Ohio 43206, by U.S. Mail, First Class postage prepaid, this 30th day of July, 1984.

I further certify that all parties required to be served have been served.

ALAN C. TRAVIS
Counsel of Record
for Petitioner

(Clerk's Stamp Omitted)

Court of Common Pleas, Franklin County, Ohio

State of Ohio	:	
Plaintiff	:	
vs.	:	Case No. 81CR-10-3653A
Donald L. Plotnick	:	
Defendant		

DECISION ON MOTION FOR NEW TRIAL

Rendered this 29th day of March, 1983.

GILLIE,

The issue posed by defendant's motion for new trial is materiality of the itmes (*sic*) not furnished by the State to defendant's counsel in discovery prior to trial.

That issue in turn hinges upon the question of whether or not those items of evidence would, in the Court's opinion, have created a reasonable doubt of guilt that did not otherwise exist. (*United States v Alberico* 604 F. 2d 1315 (1979))

The two items whose pre-trial absence from the file of defendant's counsel are the subject of defendant's motion for new trial are two pieces of information which the Court finds are not material to the case at bar, would have in no way aided defendant and could not have created a reasonable doubt of defendant's guilt if furnished to defendant's counsel before trial or presented by anyone to the jury at trial.

The first item refers to a reported delivery of marijuana to a man later named as a co-defendant of the defendant in

this case sometime in June or July, two months before the facts in issue. No fact in the report even vaguely relates to any fact in the case before the Court, nor involves credibility of material witnesses.

The other matter sought to be the basis for necessary discovery would surely have aided the State instead of defendant with its message of persons answering the descriptions of defendant and another as local enforcers of the co-defendant's threat to Larry King.

The Court therefore finds that items not furnished by the State to defendant's counsel in discovery not material as to due process, not such as would be obviously exculpatory to defendant and without the capacity to create or suggest a reasonable doubt of defendant's guilt.

It is further to be noted that defendant's counsel's request for discovery was insufficiently specific to bring the situation within acceptable guidelines set by *United States v Agurs* 427 U.S. 97 (1976) and *United States v Weiner* 578 F. 2d 757 (1978).

Any effect discrepancies in the testimony of non-material witnesses as cited by defendant would not be such as would create a reasonable doubt on defendant's behalf.

Defendant's motion for new trial is overruled.

(signature omitted)

William T. Gillie, Judge

(Appearance of Counsel omitted)